No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein, very respectfully, but very earnestly, petition for a rehearing of the above cause, in which appellants were *denied any recovery at all,* and not *merely limited to the value of the vessel involved.* Their proctors have devoted to this case an extraordinary amount of effort, and are firmly convinced that there has been in it a very serious miscarriage of justice, the consequences of which are chiefly visited upon two plain, industrious

working-men who, through no fault of either of them, sustained permanent injuries as a result of the circumstances appearing in the record and set forth in the brief herein on their behalf.

I.

THE MASTER OF THE "THREE SISTERS" WAS NEGLIGENT IN FAILING TO ORDER INJURED CLAIMANTS AWAY FROM THE HAWSER AND IN NOT ENFORCING SUCH ORDER; INJURED CLAIMANTS WERE NOT CONTRIBUTORILY NEGLIGENT, AND EVEN HAD THEY BEEN SO, THEIR NEGLIGENCE IN THIS ADMIRALTY PROCEEDING WOULD NOT BAR RECOVERY BUT WOULD ONLY DIVIDE THE DAMAGES PROPORTIONATELY TO NEGLIGENCE.

This *first* ground upon which appellants petition for a rehearing although fully briefed by proctors for appellants, *and not attempted to be met by proctors for appellee, was apparently overlooked by the court,* and the vital question presented thereby, which is determinative of appellee's *liability,* has not been decided.

This point is fully, and we believe clearly, presented in the "Brief For Appellants" herein, under sub-heading (g), on pages 72 to 81, particularly pages 75 to 81. It will be noted from the "Table of Contents" of that brief that this subdivision occurs under the superior heading: "First—The Petitioner was Negligent," as one of the respects in which appellee was *negligent,* and is concerned only with appellee's *liability* and not at all with its right

to *limitation* thereof. It is feared that this court's *failure to consider this point* was due to the fact that the order of its presentation was unfortunate and not sufficiently emphatic. This apprehension is strengthened by the fact that *appellee's brief did not mention or make any attempt to meet this contention, because, it is submitted, it cannot be answered.*

The opinion of the District Court says, with respect to the place where injured claimants were seated on the "Three Sisters":

> "Four of them sat down in the stern to play cards. The captain testifies that he warned these men that this was a *dangerous place.* This is denied by the men. It is not, however, denied that it was a *dangerous place,* for the reason that the experience of all seafaring men has shown that the vicinity of where a hawser is fastened, when the other vessel has another vessel to tow, is a *dangerous place"* (Apostles, 472, 473).

The very fact that appellee's petition (Apostles, 8), alleges that its master, "warned the said Carlsen and said Sauder, and the other two men engaged in the game of cards, to stay away from the stern of said vessel and from said tow line," shows that appellee and its master *knew and considered that to be a "dangerous place."* Moreover, the petition further alleges, in this respect:

> "Said Carlsen and said Sauder knew, or by the exercise of ordinary care for their own safety, could and should have known, that *said place upon the motorship 'Three Sisters' where*

> *they were stationed at the time of the breaking of said bridle, was a dangerous place to life and limb for anyone to remain in while said motorship was engaged in towing said barge,* and in going to and remaining at said place said Carlsen and said Sauder failed to exercise ordinary care. Had the said Carlsen and the said Sauder exercised ordinary care for their own safety as men of ordinary prudence would have done under the same circumstances, *by remaining away from said place where they were injured, they could and would have escaped all injury from the breaking of said bridle''* (Apostles, 9).

The petition goes further in making this a direct issue, alleging:

> "The said injuries to the said Carlsen and said Sauder *were in no way caused by fault on the part of said motorship 'Three Sisters', her master,* officers or crew, but were *occasioned solely by reason of the negligence of said Carlsen and said Sauder in that they, the said Carlsen and said Sauder, did not keep away from the stern of said motorship 'Three Sisters' nor from said tow-line* as they were warned by the master of said motorship 'Three Sisters' to do, and as they, as prudent men, should have done'' (Apostles, IV, 9, 10).

All of the foregoing allegations of the petition are specifically denied in the answers of appellants to the petition (Apostles, 37, 38; 17, 18). The issue of negligence on the part of appellee, in the failure of its master to warn claimants away from such dangerous place and in not enforcing such order if given, is therefore properly and directly raised. Moreover, even should it be deemed that the issue

is not framed with all the technical nicety possible, this court is well aware that, in Admiralty, lack of form or preciseness in pleading will not defeat substantive justice. Of this principle there is no better example than its own decision, in a limitation proceeding, wherein it allowed a claimant to prove failure of petitioner to comply with the steamboat inspection law, *even though no reference was made thereto in the pleadings,* saying:

> "It is true that in the pleadings no reference is made to the failure of the railway company to inspect the boiler after it was repaired, and no ground of liability is charged against the company under the provisions of Sec. 4493, by any of the injured passengers, or their representatives. On the contrary, they all seek to recover on the ground of the negligence of the company in continuing the use of a boiler known to be old and defective. *But we do not regard these facts as material.*"

The Annie Faxon, 75 Fed. 312 at 320 (C. C. A. 9). The evidence as to the alleged warning which the master gave to the men, and as to his *admitted* failure to emphasize or enforce it, is fully before the court in the language of the master himself (quoted in Brief For Appellants, 75, 76), so, by no possibility was petitioner misled by the pleadings. The most that he contends that he did, was to say *"to the men standing back aft"* to *"keep clear of the tow-line."* He does not say that he told those men to *"stay away from the stern"* (as the petition alleges, Apostles, 8), or that he said *anything to the*

two injured claimants. He admits that the men to whom he says he spoke did not reply and, when asked if they heard him, said, *"I don't know, I wouldn't testify to that"* (Brief For Appellants, 75). Claimant Carlsen, and also the other men, all positively testify that *they heard no warning from the master* (Brief For Appellants, 75; Apostles: Reid 366, 367; Woods, 420; Rowe, 424; Urquhart, 44; Evans, 341; Hanley, 255; Carlsen, 293, 294, 322, 323). The reason that claimant Sauder did not testify on the subject is that the injury to him *rendered his mind a blank as to the whole voyage* (Sauder, Apostles 439).

There is, therefore, *no conflict or dispute* as to the fact that, whatever the master said, it was not heard. At most, whatever he said was a casual remark.

In any event, *the record shows without conflict, that the master knew that either his warning had not been heard, or that, if it was heard, it was not obeyed, and that he did not repeat it, or take any steps to enforce it* (Brief For Appellants, 75, 76). He *admits* that he *saw* the men in the dangerous place *after he had uttered the alleged warning,* but said or did nothing further, washing his hands of the consequences on his theory that then:

> *"That was their own lookout, not mine.* If I tell a man to stay clear of a towline he ought to have sense enough to stay clear of it."
>
> *Cap. Krueger,* Brief For Appellants, 76.

With these facts in mind, the case is *precisely and peculiarly* within the sound *decision and very language* of this honorable court in the case of

> *Weisshaar v. Kimball S. S. Co.,* 128 Fed. at 400, 401 (C. C. A. 9); Certiorari denied, 194 U. S. 638, 484 Ed. 1162.

That case is quoted at length in the Brief For Appellants, 77-80, to which we respectfully and earnestly refer the court. In the case at bar the master, *knowing that the claimants were in a dangerous place, and not even knowing whether they had heard his alleged warning, did nothing, either by way of repeating his warning to insure that it was heard, or by way of enforcing it, or by way of avoiding the danger and injury by keeping all strain from the tow-line through stopping his engines or otherwise.*

In *Weisshaar v. Kimball S. S. Co.,* the officer warned persons in a small boat that it was overloaded and to get out. They did not obey, and such persons were drowned. So clearly did this court summarize the material facts and law, and so *exactly* do both fit the case at bar, that we cannot refrain from re-quoting, in part, the language heretofore quoted in our brief:

> "Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky,' it became the duty of all the passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that

every one who remained thereupon became guilty of contributory negligence; *such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip* * * *. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boats complement of men. *According to his own testimony he made nothing more than a milk and water protest against the entry of anyone.* * * * Even where an injured party is guilty of contributory negligence, such negligence will not defeat the action *when it is shown that the defendant might, by the exercise of reasonable care and prudence have avoided the consequences* of the injured parties' negligence. * * *

"So, here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), *it was still his right and imperative duty to refuse to start the boat* until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to."

Brief For Appellants, 77-78-79.

The same principle was also applied by the District Court of Maryland to facts which duplicate those in the instant case:

"He therefore *knew that the libelant was in a dangerous position,* and even then it was his duty, either *to see that the libelant moved from that position of danger, or to see that the gypsy was at once thrown out of gear* so as to avoid the great peril in which the libelant was placed.

> * * * It is a familiar rule that where the plaintiff's negligence *is so communicated by knowledge that by the exercise of ordinary care and skill the defendant might have avoided the injury, the plaintiff's negligence cannot be set up in defense of the action.*" *The Steam Dredge No. 1.*
>
> *Brief For Appellants,* 80.

The other cases which are cited in the above pages of our brief fully substantiate the same principle.

For these *conclusive reasons,* aside from all others, appellee is *liable* to appellants, and any negligence on their part is *no* bar. Even had injured appellants been negligent, *and were such negligence a defense,* it would be only a *partial* defense, having the effect of *dividing* the damages in proportion to the negligence, as this court knows, and as is held by the cases cited in:

Brief For Appellants, 81.

In conclusion, upon this ground for rehearing, lest this court be under any misapprehension that appellants endeavored for the first time to raise this question on the appeal, *it was fully presented to the District Court.* Appellants' brief to that court (pages 39-44) contains all of the matter comprised in pages 73-81 of their brief to this court, including the identical quotations from and citation of cases, except that, in the latter brief, the *Devona* and the *Iowan* were added to the *Tourist* and the *Max Morris.*

This point, then, as appears from the opinion of the District Court, *which was oral* (Apostles, 471-474), and the opinion of this court, although, it is submitted, conclusive of negligence on the part of appellee rendering it *liable* to appellants at least to the *extent of the value of the "Three Sisters,"* received *no* consideration from *either* court *and has not been decided.*

II.

THE OPINION OF THIS HONORABLE COURT INDICATES THAT IT WAS UNDER A MISAPPREHENSION CONCERNING WHAT WAS DECIDED BY THE LOWER COURT.

This *second* ground upon which this petition is presented, also vital and determinative of appellee's *liability,* consists of what is respectfully submitted to be a misapprehension by this court of what was decided by the lower court.

It is apprehended that another possible reason for the failure of this honorable court to consider the first ground urged for a rehearing, in addition to the burying of that ground under a sub-heading in a long brief, is a misapprehension concerning what the District Court decided. That court not only held that appellee was entitled to *limit* liability, but that it was *not liable at all.* If, as we urge, appellee's *master was negligent,* then, under the familiar doctrine of *respondeat superior,* appellee is *liable,* even though entitled to *limit* that liability.

The first sentence of this court's opinion, it is respectfully pointed out, is susceptible of the possibility that the court conceived that the District Court merely *limited* appellee's liability *to the value of the "Three Sisters,"* and did not *wholly deny,* as is the fact, *all liability* on the part of appellee. Such sentence reads as follows (italics ours):

> "This appeal is taken from the decree of the court below, *sustaining the appellee's petition for limitation of liability* for the personal injuries sustained by the appellants Carlsen and Sauder while on the motor boat 'Three Sisters' *to the value thereof.*"

Bearing in mind that appellee is a *corporation,* and that the question of its right to *limit* liability is dependent upon its design or negligence *as such corporation,* as distinguished from the negligence of its servants, the last sentence of this court's opinion emphasizes, rather than relieves, the apprehension which has been expressed. The context immediately preceding such last sentence lends added support to our solicitude in this respect. This sentence reads:

> "We are not convinced that the court below was in error in holding that the accident was not caused by the design or the negligence *of the appellee* and did not occur with its privity or knowledge."

Obviously, this is not a matter for argument, depending, as it does, solely upon this court's knowledge and intent.

III.

THIS HONORABLE COURT, IN RENDERING ITS OPINION WAS UNDER A MISAPPREHENSION OF FACT WITH RESPECT TO THE DEFICIENCY OF THE TOWING BRIDLE USED BY THE "THREE SISTERS" AND THE LACK OF INSPECTION THEREOF BY ANY OF APPELLEE'S SERVANTS, WHICH LED TO A MISAPPLICATION OF LAW, AND A DIRECT CONFLICT WITH THIS COURT'S OPINION IN A CASE SUBSEQUENTLY DECIDED BY IT ON MAY 11, 1925.

This *third* ground upon which this petition is presented, also vital and determinative of appellee's *liability,* and *also* of its right to *limit that liability,* was considered by this court, but, it is respectfully submitted, under a misapprehension of fact which led to a misapplication of law.

It stands *admitted* on the record that *neither the master nor the single deckhand* of the "Three Sisters" *ever* made *any inspection* of the steel towing bridle or swivel. It is likewise *admitted that no one* made any inspection thereof at Point Reyes *before the voyage in question began.* On the *short* voyage from Point Reyes to San Francisco the *steel* towing bridle *broke,* not only in *one* place, *but in two widely separated and distinct places.* The appellee did not disclose the *age* of the bridle, but the record shows that it had been borrowed, and had been *subjected to usage* for an *undisclosed length of time* theretofore. The appellee offered *no history* of such usage. *No* bad weather was encountered, but only the ground swells *always present and to be expected* at that place at that time of year, as was admitted

by appellee's proctors (*and it is here submitted that this court was under a serious misapprehension of fact in quoting the testimony of the captain, in the second paragraph of its opinion on page four thereof, in view of his following testimony, and proctors' admission*):

> "The weather was fair; the wind was light northwesterly; the sea was smooth except for westerly *ground swells of the kind usually encountered in those waters at that time of the year*" (Mr. Lingenfelter, Brief For Appellants, 22),

and by appellee's master:

> "There was *just an ordinary* heavy ground swell" (Cap. Krueger, Brief For Appellants, 18).

Nevertheless, while a *manila* line which bore the *entire* strain of the tow *held* and did *not* break, the *steel* bridle broke in *two places,* as aforesaid. The testimony of two *disinterested* witnesses, who *actually handled* the fastening of the bridle on *two* occasions, one of which was at the inception *of this very voyage at Point Reyes,* is that it was *not* in proper condition (Brief For Appellants, 45-48). The appellee *failed to produce* the broken bridle, and did not make any examination of it, even *after* it broke (Brief For Appellants, 63, 68). The court is in error, on page 3 of its opinion, in saying that the "prior port engineer of the appellee" testified that he *inspected* the bridle. He did not *touch* it, but merely *looked* at it while *it* was on the *barge*

and *he* was on the *wharf* (Brief For Appellants, 53).

The only person who even *claims* that he inspected the bridle was Davis, appellee's subsequent port engineer. We ask the court to reread what was said in our brief concerning his testimony, pages 54 to 66, and, if it is not presumptuous on our part, the whole of that man's testimony, in the light of our said comment thereon. As stated in our brief, pages 11, 12, *we do not ask this court to resolve any conflict of evidence in appellants' favor. We do ask that, when a man says black is white, or says that he did something which his own testimony clearly shows he did not do, and which the event itself proves he did not do, this court refuse to accept his statement.* We ask this honorable court, in this respect, as to the testimony of Davis, to remove itself from the sphere of the following criticism of an Admiralty authority of distinction and authority, and to follow its *own* combined intelligence and ability:

> "The appellate courts have gone very far in practically refusing to review questions of fact where the District Judge has had the witnesses before him, though not so far where part or all of the evidence has been by opposition. *This doctrine is largely an abdication of the trust confided in them,* and, for an admiralty court, smacks too much of the old common law fiction as to the sacredness of a jury's verdict. * * *
>
> But in districts of *crowded dockets, where numerous cases, each with numerous witnesses, are tried in rapid succession,* and then taken

> under advisement for months, nothing short of a moving picture screen, with a photographic-phonographic attachment, could bring it back to the judicial mind. *To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give.* That seeing witnesses is an advantage cannot be denied. *But its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to overbalance it."*
>
> *Hughes on Admiralty,* 2nd Ed., pp. 409-410.

Bearing in mind the above brief summary of fact, it is respectfully submitted that the decision in the instant case is in *direct conflict* with its more recent and sound decision in the as yet unreported case of *United States King Coal Co.,* May 11, 1925, C. C. A. 9.

As that case is still fresh in the mind of the court, we shall quote from it only briefly. After quoting from the case of *The Olympia,* 61 Fed, 120, which involved the breaking of a *tiller rope,* and following the sound principles therein laid down by Judge Lurton with respect to inevitable accident, this court said:

> "Had the Commanding Officer, *under the circumstances disclosed in the testimony, the right* to put the electric steering apparatus, controlling the rudder up against a strong running flood tide, throwing suddenly on the apparatus a load too great for the fuse to carry?
>
> The burden is clearly upon the officers of the submarine to justify such dangerous naviga-

> tion. *The strain on the electrical apparatus should have been anticipated* when too great a load was placed upon it. *In the situation we have here presented the doctrine applicable is res ipsa loquitur—the situation speaks for itself* —and fixes the charge of negligence upon the submarine."
>
> *Typewritten Opinion,* p. 15.

We are confident that the application of this principle to the case at bar must result in the granting of a rehearing. The same principle has been frequently applied to the breaking of towing *hawsers and bridles*—the tug is bound to *anticipate any weather ordinarily to be expected* in the course of the voyage which she undertakes, and to provide hawsers and bridles *of sufficient strength to hold therein:*

The Supreme Court said, in the *Quickstep,* supra:

> "If it was good seamanship on the part of the *captain of the tug* to back in such an emergency, *he was required, before undertaking it, at least to know that his bridle line would hold."*

Judge Benedict said in the *Francis King,* supra:

> *"This breaking of her hawser casts upon the tug the responsibility of the loss which resulted therefrom.* * * * The towboats engaged in that business must be competent in power and equipped *with hawsers of sufficient strength to hold their tows in any weather ordinarily to be anticipated in that navigation."*

In the *Sweepstakes,* the court said:

> "Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and *so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed.*"

It was sufficiently pointed out in our brief that the doctrine of *res ipsa loquitur* applies equally to *tort* cases and *contract* cases. Hence, the fact that this court holds injured appellants not to have been "passengers" in a technical sense, is not material. It is respectfully submitted that the application of the law *to the facts* upon this point would result in a determination that appellee is *liable and not entitled to limit* that liability, since the appellee was privy to the negligence of its port engineer Davis (Brief For Appellants, 81-91).

It would be futile to reargue fully a point which we believe was fully presented in the Brief For Appellants. We therefore respectfully refer the court to the portions of our brief which state the facts and the law with respect to this question.

We ask that the court first reread pages 11 and 12 of our brief; then reread sub-heading (a′) page 15 to (a″), page 25; then to reread sub-heading (b), page 44 to (2), page 70; then the quotations from the following cases on the following pages of that brief, as well as its own above decision of

May 11, 1925, in *U. S. v. King Coal Co.,* not yet in print:

Steam Tug Quickstep, p. 30; *The Francis King,* pp. 30-32; *The Nettie,* p. 32 (and cases cited thereunder); *The Sweepstakes,* pp. 34, 35; *Leech v. S. S. Miner,* p. 28; *The Wasco,* pp. 29, 30; *The W. G. Mason,* p. 39; *The Enterprise,* pp. 36-38.

IV.

THIS HONORABLE COURT ERRED IN CONSTRUING R. S. 4493 AS APPLICABLE ONLY TO COMMON CARRIERS OF PASSENGERS, OR TO CARRIERS OF "PASSENGERS" IN ANY TECHNICAL LEGAL SENSE OF THAT WORD.

This *fourth* ground upon which this petition is presented, also vital and determinative of appellee's right to limit liability, consists of what is respectfully submitted to be an error of law in construing Federal Statutes.

As this court itself has said of R. S. 4493, holding *inspection* to be a *condition* to the right to limit liability:

> "Section 4493, as appears by its title as well as by its provisions, *was intended to provide for better security of life on board steam vessels.*"
>
> *The Annie Faxon,* 75 Fed. at 318 (C. C. A. 9.)

As pointed out in Brief For Appellants, p, 93, the inspection laws, after the decision in the *Annie*

Faxon, were extended to *all* vessels, instead of being confined to *steam* vessels, and by Sec. 4427, expressly to tug-boats, towing boats and freight boats.

It is submitted that the *very purpose* of R. S. 4493, and such related sections, is to prevent or deter vessel owners from undertaking to carry *innocent persons on vessels which have not been inspected, and to so expose them to danger.* The purpose was not to distinguish between one who was being carried *free of charge* and one who was *paying fare,* but, in the above language of this court, "to provide for better *security of life* on board steam (now any) vessels." The word "passenger" was used in such statute, not in any narrow and technical legal sense, but in the same sense as it is used and defined in the English Shipping Act of 1894:

> "The expression 'passenger' shall include *any person carried in a ship other than the master and crew, and the owner, his family and servants.*"
>
> *Brief for Appellants,* p. 9.

Deeply appreciating that this honorable court is fully as solicitous to dispense justice as are our clients to receive it, we ask a rehearing on behalf of appellants, convinced that, inadvertently, *substantial error has been committed,* which, when corrected, will result in a decree fixing *liability* upon appellee for the serious, permanent injuries to two

deserving men, and in the denial of any *limitation* thereof, or *at least,* in the former relief.

Dated, San Francisco,
May 18, 1925.

Respectfully submitted,
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JOSEPH J. MCSHANE,
Proctors for Appellants and Petitioners, Carlsen and Sauder.
REDMAN & ALEXANDER,
BELL & SIMMONS,
Proctors for Appellant and Petitioner, Aetna Life Insurance Company.

Certificate of Counsel.

We, Jewel Alexander, Golden W. Bell, Henry Heidelberg, and Joseph J. McShane, hereby certify that we are of counsel for the appellants in the above entitled cause, and that in our opinion the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,
May 18, 1925.

Jewel Alexander,
Golden W. Bell,
Henry Heidelberg,
Joseph J. McShane,
Of Counsel for Appellants and Petitioners.